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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES *et al.*,
Appellants,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION *et al.*,
Appellants,

v.

LEON KNIGHT *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Minnesota

MOTION OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICUS CURIAE*

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MOTION OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS FOR LEAVE TO FILE BRIEF OUT OF TIME

The American Association of University Professors ("AAUP") respectfully moves for leave to file the annexed brief *amicus curiae* in these consolidated cases.

Counsel for all appellants and appellees have consented to the filing of the AAUP's *amicus* brief, and have also authorized us to represent that they have no objection to the extension of time requested in this motion.

A. Interest of Amicus

Founded in 1915, the AAUP is the nation's oldest and largest organization dedicated exclusively to advancing the interests of professors and research scholars in all academic disciplines. The AAUP has approximately 65,000 members in 1300 local chapters on college and university campuses across the country. Since 1972, the AAUP has endorsed and supported efforts by local chapters to engage in collective bargaining activities. Today, approximately sixty chapters are certified as exclusive bargaining representatives and engage in the full range of collective bargaining activities on behalf of faculty members at their institutions.

One of the AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for faculty employment, academic tenure, and the protection of academic freedom. Central among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* prepared jointly by the AAUP and the Association of American Colleges and subsequently endorsed by over one hundred educational organizations and learned societies.[1]

Other AAUP policy statements bear directly on the events that gave rise to the consolidated cases now before the Court. The widely recognized *Statement on Government of Colleges and Universities*, formulated in 1966 by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges,[2] describes the respective responsibilities of the fa-

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[1] The 1940 *Statement* and other AAUP policy statements described in this motion and accompanying brief are reprinted in AAUP POLICY DOCUMENTS AND REPORTS (1977), a copy of which has been lodged with the Clerk. This compendium of policy statements is referred to hereinafter as "*AAUP Documents*." The 1940 *Statement* appears on pages 1 to 4.

[2] *AAUP Documents* 40-44. Appellant Minnesota State Board for Community Colleges is a member of the Association of Governing Boards of Universities and Colleges.

culty, the administration, and the trustees in governing an institution of higher education and establishing institutional policy. The AAUP's 1973 *Statement on Collective Bargaining*[3] endorses the formation of faculty unions as an appropriate mechanism for preserving academic freedom and promoting sound academic government.

Federal and state courts throughout the country have applied AAUP policies to resolve disputes over the terms and conditions of faculty employment. The AAUP regularly participates as *amicus curiae* in cases before this Court that implicate matters of AAUP policy.[4]

B. Reasons for Granting the Motion

The primary issue in these cases is the constitutionality of the process for selecting the faculty members of meet-and-confer committees in the Minnesota Community College system. This issue implicates questions of academic institutional governance, which are the subject of AAUP policies. Because the selection process at issue contra-

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[3] *AAUP Documents* 56.

[4] In recent years, the AAUP has participated as *amicus curiae* in this Court in many cases, including Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); and City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). The Court has referred to AAUP policy statements on several occasions in the past. *E.g.*, Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 756 (1976); Board of Regents v. Roth, 408 U.S. 564, 579 n.17 (1972); Tilton v. Richardson, 403 U.S. 672, 681-82 (1971).

The lower federal courts regularly rely on AAUP policies in prescribing rules of conduct in higher education. *E.g.*, Gray v. Board of Higher Education, City of New York, 692 F.2d 901, 907 (2d Cir. 1982) ("[c]ertain AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies").

venes AAUP principles and traditions of academic governance, we initially assumed that AAUP's *amicus* brief would be due at the same time as the brief of the appellees in late July.

The AAUP's potential *amicus* participation was widely discussed at the AAUP's Annual Meeting on June 18. Thereafter, the decision was made to file an informational brief *amicus curiae* setting forth the Association's policy positions and supporting neither appellants nor appellees on the ultimate question of affirming or reversing the decision of the court below.

Although the AAUP's brief was substantially written, the decisions made on June 18 required revisions and further internal consultation. Printing the brief took several additional days. For these reasons, the AAUP was unable to submit its brief at the time the appellants' briefs were due (June 20), and is filing this motion and its brief seven days thereafter.[5]

The AAUP believes that an extension will not prejudice any party. The appellees, who have consented to the extension, will have sufficient time to respond as appropriate to the points contained in the AAUP's *amicus* brief.

We also believe that the brief may be useful to the Court and parties in illuminating some of the observations on university governance and collective bargaining expressed in the decision of the three-judge district court.

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[5] It is not clear to the AAUP that this motion is necessary. It is filed as a precautionary measure. With respect to the single issue addressed in our *amicus* brief, the AAUP takes a position inconsistent with the Minnesota statute invalidated by the court below and defended by the appellants in this Court. Nevertheless, because we do not address the constitutional issues before the Court and support neither party on the ultimate issue of affirmance or reversal, we have filed this motion in the event that Rule 36.2 is construed to require the filing of our *amicus* brief within the time allotted to the appellants for filing their briefs.

The lower court decision described what it termed the "longstanding tradition of faculty participation in college goverance," and addressed novel questions on the relationship between traditional forms of governance and new alternatives contained in collective bargaining agreements. As an organization that formulates widely followed national standards on these subjects and includes in its membership more than 35,000 faculty members who engage in collective bargaining, the AAUP is uniquely situated to speak to the questions now before the Court.

CONCLUSION

For the foregoing reasons, the AAUP respectfully requests that its motion for leave to file the annexed *amicus* brief be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE*

This brief is filed, with the consent of all parties, by the American Association of University Professors ("AAUP"), *amicus curiae*.

INTEREST OF AMICUS CURIAE

The interest of the AAUP is described in the accompanying motion for leave to file this brief *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ruling of the three-judge court below was predicated in large measure on assumptions about the manner in which institutions of higher education are governed and the relationship between traditional forms of faculty participation in academic policy making and newer forms involving collective bargaining. This *amicus* brief attempts to develop more fully this aspect of the lower court's decision. The AAUP does not address the constitutional issues raised by this appeal and supports neither affirmance nor reversal of the court's ruling. We seek rather to inform the Court, from our vantage point as an educational organization with two-thirds of a century of experience in academic policymaking, about considerations implicit in the lower court's opinion that may be relevant to the final disposition of these cases.

The strong American tradition of faculty participation in setting educational policy is reflected in the AAUP's 1966 *Statement on Government of Colleges and Universities*, which endorses the concept of a forum for the presentation of the views of the whole faculty. The AAUP's 1973 *Statement on Collective Bargaining* approves of unionization as a mechanism for advancing faculty interests, and also urges a faculty collective bargaining representative to establish democratic structures within the institution providing full participation by all faculty. This brief will examine in some detail the considerations underlying these policy positions.

In Part I of the Argument, we show that faculty members acting through collective governance mechanisms should have primary decisionmaking responsibility in areas relating to educational policy. In Part II, we show that collective bargaining is entirely consistent with traditional forms of academic governance with respect to the faculty's role in educational policymaking. Finally, in Part III, we describe briefly the conclusions reached in 1977, when the AAUP's Standing Committee on College

and University Government examined related developments in the Minnesota State University System.

To comport with normative academic practice as embodied in AAUP policy statements, an institutional forum should exist for the expression and consideration of the views of all faculty members on matters of educational policy. A system of collective bargaining in which the certified agent negotiates on the terms and conditions of employment is not inconsistent with academic practice or AAUP principles. Intimating no views on the constitutional questions before the Court, we urge only that the Court's disposition of these cases be consistent with these principles.

ARGUMENT

AS A MATTER OF SOUND ACADEMIC PRACTICE, FACULTY PARTICIPATION IN THE FORMULATION OF EDUCATIONAL POLICIES SHOULD NOT BE CONDITIONED ON MEMBERSHIP IN A FACULTY UNION.

I. The Nature of Faculty Service to the Institution

Reflecting the experience of the German university in the nineteenth century,[1] American higher education has fostered the concept of faculty influence on the governance of the institution.[2] The model allocation of responsibility

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[1] The abundant literature on the structural origins of the modern American university is cited and well described in Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 822-29 (1983). For a fuller exploration of the same ground, *see* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 209-407 (1955); Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 AM. ASS'N UNIV. PROFESSORS BULL. 124 (1955).

[2] On October 26, 1876 Benjamin Rush, an early trustee of Dickinson College in Pennsylvania, is reported to have written to his fellow trustees: "When our professors cease to be qualified to share in the power of the College, it will be proper to dismiss them, for

places in the hands of the faculty, acting collectively, primary responsibility over education policymaking in such areas as curriculum, methods of instruction, the conduct of academic research, and faculty appointments and promotions. The tradition of faculty control in these and related areas is based on the premise that faculty members can bring collective expertise to bear in shaping the educational mission of the institution, with expression of the range of faculty views assisting in the search for truth.[3]

"The university," an eminent scholar has noted, "differs radically from most other types of organizations, such as governments, business enterprises, or armies, because of the particular purposes of the academic institution."[4] Universities exist to teach students and to advance human learning, tasks that involve intimate relationships between teacher and student on the one hand, teacher and subject-matter on the other.

The implications for university government are clear and immediate. Universities are not governed as other institutions traditionally are:

> . . . The people "on top" in an academic institution are not necessarily the trustees, the president, or the deans, but in many situations the professor-teachers in their lecture halls and seminars or the professor-researchers in their studies and laboratories. Decision-making in the university must involve the teacher-researcher "on the assembly line" because he

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government and instruction are inseparably connected." J. Corson, GOVERNANCE OF COLLEGES AND UNIVERSITIES 97 (1960). See M. Ross, THE UNIVERSITY: THE ANATOMY OF ACADEME 159 (1976).

[3] *See* T. HUNGATE, MANAGEMENT IN HIGHER EDUCATION 66-67 (1964): "The [university's governing] board, in fulfilling its responsibility for management, requires the aid of the faculty . . . in part because the task is too big to be carried out unaided, but more especially because the board does not, unaided, possess the best judgment on all matters involved."

[4] H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT 1 (1972).

> chiefly knows intimately what the "production" of the university is all about; it is his immediate proximity to the personal tensions of learning and scholarly creation which gives legitimacy to much of the decision-making for the academic community.[5]

Shared authority is integral to the concept of an effective university because "the variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence" among components of the institution.[6]

The faculty's authority in matters of educational policy creates a corresponding obligation on the part of individual faculty members to participate in institutional governance—an obligation that is both an ethical canon of the profession and a common criterion for promotion and tenure. Service on institutional or departmental faculty committees is a stated requirement at many institutions. Such service is emphasized in the AAUP's *Statement on Professional Ethics*, which has been adopted at many institutions: "As a colleague, the professor has obligations that derive from common membership in the community of scholars . . . . He accepts his share of faculty responsibilities for the governance of his institution."[7] The ethical obligation is supported by a practical corollary. Factors such as "institutional service" or "campus committee work" are commonly considered, along with teaching and research, in decisions on faculty promotion, tenure, and salary increases.[8] At junior colleges, in fact,

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[5] *Id.*

[6] *Id.* xiii.

[7] *AAUP Documents* 65-66.

[8] At one state-supported institution, for example, faculty members are evaluated for reappointment and promotion on the basis of three criteria: teaching effort and effectiveness, scholarly activity, and "service to the department, the University, [and] the community." Department of Sociology Personnel Policy, Univer-

institutional service may be more important to the career of a faculty member than at four-year institutions where the opportunity for research is correspondingly greater.[9]

In Minnesota, the role of faculty members in institutional goverance is obliquely acknowledged under the Minnesota Public Employment Labor Relations Act,[10] which ascribes to the statutorily-created "meet and confer" committees a purpose and justification consistent with traditional notions of academic governance:

> . . . professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies.

Minn. Stat. § 179.73, subd. 1. As the court below observed, the work performed by community college faculty members in Minnesota who serve on institutional meet-and confer committees is "integral to the profes-

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sity of Delaware, *quoted and discussed in* Scott v. Univ. of Delaware, 601 F.2d 76, 79 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). Criteria similar to these are commonly used at American universities. *See, e.g.*, Clark v. Whiting, 607 F.2d 634, 636-7 (4th Cir. 1979); Carr v. Board of Trustees of the University of Akron, 465 F. Supp. 886, 891, 893 (N.D. Ohio 1979), *aff'd mem.*, 663 F.2d 1070 (6th Cir. 1981); Kunda v. Muhlenberg College, 463 F. Supp. 294, 301 (E.D.Pa. 1978), *aff'd*, 621 F.2d 532 (3rd Cir. 1980); Tyler v. College of William and Mary, 429 F. Supp. 29, 30 (E.D. Va. 1977); Pace College v. Commission on Human Rights, 38 N.Y.2d 28, 34, 339 N.E.2d 880, 882, 337 N.Y.S.2d 471, 474 (1975).

[9] See Gustad, *Policies and Practices in Faculty Evaluation*, 42 EDUC. REC. 194, 200, Table 3 (1961); Astin & Lee, *Current Practices in the Evaluation and Training of College Teachers*, 47 EDUC. REC. 361, 369, Table 4 (1966) (campus committee work considered of "major importance" in 32% of liberal arts colleges and in 41% of junior colleges).

[10] 1971 Minn. Laws ch. 33, Minn. Stat. § 179.61 *et seq.* (1980) (hereinafter the "Act" or the "Minnesota Act").

sional function of a college professor." App. 24.[11] We respectfully submit that this conclusion of the court below is unassailable as a matter of tradition and sound academic policy. So is the corollary that flows from it: a faculty member who, on the basis of nonacademic criteria, is excluded from the process by which the faculty exercises its educational policymaking authority is being deprived of an essential attribute of faculty status.

II. The Relationship Between Faculty Collective Bargaining and Institutional Governance

Collective bargaining by faculty members in higher education is a development of the last fifteen years, but even in that short time it has proved its effectiveness in advancing faculty interests.[12] In 1973, the AAUP expressly endorsed collective bargaining for teachers, researchers, and other professional higher education em-

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[11] As used herein, the abbreviation "App." refers to the Appendix to the Jurisdictional Statement filed November 30, 1982, by the appellants in No. 82-898.

[12] M. Baratz, *Shared Authority and Collective Bargaining*, 59 EDUC. REC. 193 (1978). Statistics compiled by Joseph Garbarino, Director of the Faculty Unionism Project at the University of California at Berkeley, show that the number of unionized faculty members at four-year institutions of higher education grew from 3,300 in 1968 to almost 67,000 in 1975. Over the same seven-year period, the number of unionized faculty members at two-year institutions increased from 11,000 to 35,000. J. W. Garbarino, *Faculty Union Activity in Higher Education—1975*, 15 IND. RELATIONS 119 (1976).

Professor Robert Gorman, past president of the AAUP and a nationally respected expert on labor relations, observed in 1982 that "collective bargaining represents a form of university governance in which the faculty shapes the regulations that govern the institution in personnel matters and in educational matters .... Collective bargaining has indeed vindicated the expectation of our membership . . . that it would be a constructive method for promoting the objectives of our Association." *The AAUP and Collective Bargaining: A Look Backword and Ahead*, 68 ACADEME 1a, 1a-3a (1982).

ployees in its *Statement on Collective Bargaining*. Through collective bargaining, the faculty not only can strengthen its collective ability to influence the distribution of an institution's economic resources, but also can work to enhance academic freedom and tenure, due process, and sound academic governance. The *Statement on Collective Bargaining* encourages the faculty representative to foster within the institution structures of governance that provide full participation by the faculty.

Models of institutional structure are described more fully in the *Statement on Government of Colleges and Universities*. Under the *Statement on Government*, the faculty acts in the first instance on all matters of educational policy:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. . . . The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.
>
> Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy.[13]

The lower court's decision indicates that subjects within the purview of the meet-and-confer committees include some matters of primary faculty responsibility, such as "new course proposals and other curriculum matters, . . . student rights and student affairs generally, . . .

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[13] *AAUP Documents* 43.

academic accreditation of the community colleges, and other matters." App. 49.

After identifying areas of primary faculty responsibility, the *Statement on Government* describes the governing mechanisms that safeguard the faculty's authority in those areas:

> Agencies for faculty participation in the government of the college or university should be established at each level where faculty responsibility is present. An agency should exist for presenting *the views of the whole faculty* . . . .
>
> The agencies may consist of meetings of all faculty members of a department, school, college, division, or university system, or may take the form of faculty-elected executive committees in departments and schools and a faculty-elected senate or council for larger divisions or the institution as a whole.[14]

As the court below observed, the meet-and-confer provision in the Minnesota Act was intended to "codif[y] a longstanding tradition of faculty participation in college governance." App. 18. The meet-and-confer committees replace "faculty senates . . . selected through elections in which every faculty member was eligible to both vote and seek election." *Id.* 20. The decision of the lower court makes it clear that faculty members who were excluded from the selection process for the meet-and-confer committees were effectively excluded from the process through which "official" faculty concerns and views were expressed. App. 20, 51. It is inconsistent with sound principles of academic collective bargaining to condition faculty participation in the formulation of educational policies on membership in a faculty union. To the extent that this has occurred in higher education in Minnesota, AAUP policies are violated.

We must, however, express an important qualification. There is a critical analytic distinction, recognized by the

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[14] *Id.* 43-44 (emphasis added).

Minnesota Act, between subjects that relate to the terms and conditions of employment, such as wages, hours, and working conditions, and subjects that relate to academic policy, such as curriculum, admission, and student degree requirements. Under the Act, the former subjects come under the jurisdiction of "meet and negotiate" committees. Under the AAUP's policies as consistently interpreted and in accordance with common institutional practice, the certified bargaining agent has the right to exclude nonunion members from serving on meet-and-negotiate committees; that practice was not challenged in the court below and would not be prohibited by the holding or the reasoning of that court. Thus, the Act draws an important distinction between negotiating and conferring. The AAUP does not in this brief take a position on the correctness of the allocation of specific subjects between the meet-and-confer process and the collective bargaining process under Minnesota law. We do submit, however, that those subjects properly within "primary faculty responsibility" should be open to participation and conferring by all faculty members.[15]

III. The Application of AAUP Standards to the Governance Structures Established in Public Higher Education Under Minnesota Law

In 1977, the AAUP had occasion to examine the application of its governance and collective bargaining precepts to public-sector higher education in Minnesota. After the Minnesota Act became law in 1971, a collective bargaining agent representing faculty members at six publicly-operated state institutions negotiated a collective bargaining agreement with the trustees of the Minnesota

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[15] The lower court ordered cumulative voting for the future selection of faculty representatives to the meet-and-confer committees. *See* Appellant's Motion to Expand the Record and Add an Issue, April 28, 1983. The *Statement on Government of Colleges and Universities* contemplates, in contrast, that methods for selecting faculty participants should be designed by the faculty.

State University System. At the direction of the bargaining agent, various faculty committees on curriculum, graduate education, learning resources, and other subjects were dissolved. Simultaneously, the functions performed by these committees were transferred to newly-constituted committees operating under the aegis of the bargaining agent. Appointments to the new committees were restricted to union members. In a subsequent report, the AAUP's Standing Committee on College and University Government concluded that the new arrangement violated traditional standards of institutional governance:

> We view this restrictive practice as inimical to sound principles of academic government and of collective bargaining at an academic institution. . . . [S]ince service on faculty committees is often one of the criteria for retention, promotion, or tenure, conditioning eligibility for committee service on union membership is a potential threat to academic freedom and unfairly discriminates against faculty members who wish to exercise their right not to join the faculty's union.[16]

The cases now before the Court challenge the same restriction established pursuant to the same state statute. While taking no position on the constitutionality of the practice, the AAUP believes that, as a matter of sound academic policy, all faculty should have an opportunity to participate in the selection of meet-and-confer committees in the Minnesota Community College System. Without an open selection process, the committees cannot be said to provide a forum for the expression of the views of the entire faculty on matters of educational policy. Equal access to that forum is essential if the views of the entire faculty are to be heeded on subjects at the core of the education enterprise.

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[16] "Committee T Objects to Practices at Minnesota State Universities," 11 ACADEME 8 (June, 1977).

CONCLUSION

For the reasons set forth above, we respectfully urge the Court to be guided by two widely honored precepts of academic policy. First, a system of collective bargaining where the bargaining agent negotiates on terms and conditions of employment is not inconsistent with academic practice or AAUP principles. Second, to comport with normative academic practice as embodied in AAUP principles, faculty participation in the process for establishing educational policies should not be conditioned on the academically irrelevant criterion of union membership.

Respectfully submitted,

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